

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 6, 2006 Session

CAROLYN JOHNSON CLARK v. TIMOTHY S. FOURNET

Appeal from the Circuit Court for Putnam County
No. 05J0208 John A. Turnbull, Judge

No. M2006-00616-COA-R3-CV - Filed on March 28, 2007

A plaintiff appeals the dismissal of her action by the trial court and argues that her filing of a complaint reflecting an old docket number complied with the saving statute, Tenn. Code Ann. § 28-1-105(a), and with Tenn. R. Civ. P. 3. Because we find no authority for limiting the availability of the saving statute on the basis of the file number or docket number assigned, we reverse.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Reversed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN, and FRANK G. CLEMENT, JR., JJ., joined.

Wm. Kennerly Burger, Murfreesboro, Tennessee, for the appellant Carolyn Johnson Clark.

Daniel H. Rader, III, Cookeville, Tennessee, for the appellee, Timothy S. Fournet.

OPINION

This is an appeal from the trial court's dismissal of Carolyn Clark's medical malpractice lawsuit against Dr. Timothy Fournet, who had performed an angiogram on Ms. Clark. Ms. Clark filed her original complaint in the Circuit Court for Putnam County within the statute of limitations. On May 14, 2004, she voluntarily dismissed that lawsuit, which had been assigned civil action No. 03J0470, pursuant to Tenn. R. Civ. P. 41.

On May 13, 2005, barely within the one-year time period of the saving statute, Tenn. Code Ann. § 28-1-105(a), Ms. Clark returned to the courthouse to file a new complaint knowing she had only one day left in which to save her claims against the doctor. According to an affidavit filed by a deputy court clerk, the following transpired:

Carolyn Clark came in and filed the attached document at the front. One of the Clerks filed the paper for her. She had some questions that she did not understand and the Deputy Clerks asked me to come to the front and speak with her. Carolyn Clark advised me that she wanted to file this because this was the last day that she had to do it. I advised her that she already had a number on it and asked if she wanted to re-use the same number. I advised her that she could file it the way she had prepared it as a re-opened case and it would cost her less money, or she could file it as a new case and it would cost additional money. She indicated that she wanted to file it as a re-opened case since it would cost less money. I did so.

The “attached document” was a complaint. The docket number of the case previously dismissed by Ms. Clark appeared on it, No. 03J0470. Process was issued, and Dr. Fournet was served. He promptly filed a motion to dismiss on May 24, 2005. The motion asserted the case was barred by the statute of limitations

because the additional filing by the plaintiff was not legally correct and constitutes a nullity. In this regard, it is averred that a new document was filed in a closed case. There was no new suit filed within the time period allowed by the savings statute, and accordingly, the one-year statute of limitations bars this suit. The refile of the complaint in a closed file for which jurisdiction has already lapsed from this Court constitutes a nullity and is not a permissible refile within the contemplation of the savings statute.

Apparently in response to this motion, Ms. Clark contacted the clerk’s office. Again according to the deputy court clerk’s affidavit, “later [after the initial filing], Carolyn Clark called our office and complained to Marcia Borys. At that time I was instructed to open a new case; give this case a new number; and open a new file.”

The new number given to the lawsuit was No. 05J0208, but the file date of the complaint remained unchanged. In fact, the complaint in the record before us bears that number as do all subsequent filings. While the record’s copy of Dr. Fournet’s May 23, 2005 motion to dismiss and other filings by Dr. Fournet around the same time reflect hand-made changes to the new case number, later filings and orders simply reflect the new number.

Meanwhile, the case proceeded. One day before he filed his motion to dismiss, Dr. Fournet filed a motion for summary judgment, and Ms. Clark responded *pro se*, submitting an unsworn statement from a medical expert. The motion for summary judgment was granted by order entered June 24, 2005.¹ Ms. Clark, again acting *pro se*, filed a motion to alter or amend the judgment, submitted a medical expert’s affidavit, and stated she had been unable to get the affidavit prior to

¹The claims against another defendant, Cookeville Regional Medical Center, were dismissed by order of June 28, 2005, on the basis of the statute of limitations since the saving statute does not apply to governmental entities. That order was certified as final and is not part of this appeal.

the hearing on the motion for summary judgment. Dr. Fournet opposed the motion and set it for a hearing. Ms. Clark asked for a continuance to enable her to hire counsel. The trial court gave Ms. Clark some additional time “to file a competent medical affidavit” and reset the hearing. After that hearing, the court set another hearing to address legal issues raised.

Counsel for Ms. Clark filed a notice of appearance and other filings related to the Rule 59 motion to alter or amend and the summary judgment. After a hearing, the court entered an order on October 24, 2005, stating in part “Summary judgment remains in effect and this case is dismissed with full prejudice with respect to all issues with the exception of the allegations of negligence regarding the post cardiac catheterization care.” The order permitted limited discovery to determine if there was a factual dispute regarding whether the drug Heparin had actually been administered to Ms. Clark post-operatively pursuant to orders of Dr. Fournet. Thus, the court partially granted Ms. Clark’s Rule 59 motion pending a hearing on the issue specified.

Dr. Fournet then filed a deputy court clerk’s affidavit in support of his previously filed motion to dismiss based on statute of limitations and renewed that motion. After a hearing, the trial court granted the motion to dismiss “upon a review of the court files, Civil Action Number 03J0470, and Civil Action Number 05J0208,” among other documents. The order dismissing Ms. Clark’s case was entered February 24, 2006. Ms. Clark filed a timely notice of appeal from that order.²

The question in this appeal is whether the filing of the complaint by Ms. Clark on May 13, 2005, complied with the saving statute, Tenn. Code Ann. § 28-1-105, so as to protect her complaint from dismissal based on the statute of limitations. The saving statute allows a plaintiff to refile an action within one year of the voluntary nonsuit of the first action. *Cronin v. Howe*, 906 S.W.2d 910, 912-13 (Tenn. 1995). The saving statute is considered remedial and is to be construed liberally to preserve the rights of diligent plaintiffs. *Kee v. Shelter Ins. Co.*, 852 S.W.2d 226, 228 (Tenn. 1993); *Dukes v. Montgomery County Nursing Home*, 639 S.W.2d 910, 912-13 (Tenn. 1982). The purpose of the statute is to give plaintiffs a “brief period” within which to refile their suit after it has been concluded on a basis other than dismissal on the merits. *Nashville, C. & St. L. Ry. v. Bolton*, 184 S.W. 9, 11 (1911).

The statute requires the plaintiff to “commence a new action” within one year after the prior voluntary dismissal. Tenn. Code Ann. § 28-1-105(a).

All civil actions are commenced by filing a complaint with the clerk of the court. An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not and whether process be returned served or unserved. . . .

² Although Ms. Clark’s brief includes arguments regarding the summary judgment, those issues are not before this court. The notice of appeal clearly designates the final order entered February 24, 2006, as the judgment appealed from. That order granted the defendant’s motion to dismiss, which motion was based on the statute of limitations arguments set out earlier.

Tenn. R. Civ. P. 3 (emphasis added).

Ms. Clark filed a complaint with the clerk within the time allowed by the saving statute. Dr. Fournet argues that Ms. Clark attempted to re-open an old case rather than commence a new action. This argument is based on the file number first given to the complaint.

We can find no basis for giving such significance to a file number. Dr. Fournet was promptly served with the complaint and was on notice of Ms. Clark's revival of her claims against him. He suffered no prejudice from the file number first assigned or the subsequent change in that number. We find no requirement in the statute or the relevant rules that would limit the availability of renewal of a lawsuit on the basis of the file number assigned.

Accordingly, we reverse the judgment of the trial court dismissing the action. Costs on appeal are taxed to the appellee, Timothy S. Fournet.

PATRICIA J. COTTRELL, JUDGE